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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
****
CASE NO. 2019AP001876-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2010 CF 222**
(Juneau County)

DONALD P. COUGHLIN,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE JOHN ROEMER (JURY TRIAL), JAMES EVENSON (SENTENCING), AND STACY SMITH (POSTCONVICTION MOTION) PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

BY:

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CASES CITED

ARGUMENT

I. THE CONVICTIONS RELATED TO COUNTS 1-9 AND 11-22 SHOULD BE VACATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THEM.

Defendant Coughlin faced trial on 21 Counts. Counts 1-10 and 11-21 of the amended information all alleged defendant had touched the penises of G. F., John Doe 1[1] (Counts 1-6), J. C., John Doe 2 (Counts 7-9 and 11) and A. F., John Doe 3 (12-21) during relevant time periods. Count 22 alleged defendant had repeatedly sexually assaulted John Doe 3 during a specified time period. The sexual contact alleged in Count 22 was unspecified.[2]

Even though the specific conduct alleged against defendant in Counts 1-10 and 11-21 was the touching of the victims' penises by defendant during specified periods, the jury heard a great deal of other sexualized conduct allegedly occurring between defendant and the three relevant victims.

A. Evidence related to John Doe 1.

John Doe 1 testified to engaging in at least seven sexual behaviors with defendant or in defendant's presence; (1) He testified defendant would occasionally suck his penis (299:162); (2) He testified he would stroke defendant's penis (299:162); (3) He testified defendant would stroke his penis (299:162); (4) He testified he would masturbate in defendant's presence (299:168); (5) He testified defendant would measure his penis (299:165-66); (6) He testified defendant would "sack tap" him, an act where defendant would use his hand, back or front, to "smack" him in the genitals to inflict pain (299:152) and (7) He testified defendant would engage in "grubbing,"

[1] In its brief, the State names the victims as John Doe 1, 2 and 3. For purposes of the reply brief, the defense will use these identifiers.

[2] In its brief, the State challenged the defense assertion in its brief-in-chief, pages 12 and 18, that all of the sexual assault counts alleged that defendant had touched the penis of the victim (State's brief at 22). The State is technically correct in that the sexual conduct in Count 22 was not limited to acts of defendant touching the penis of John Doe 3. That does not materially impact on the defense analysis.

where he would grab John Doe 1's testicles or genitals and he would squeeze (299:154).

While it is understandable that John Doe 1 may not have been able to state with precision when relevant behavior occurred, most of it was not charged behavior. Of the seven sexual behaviors set forth above, only behaviors (3) and possibly (5) were charged in the relevant counts, Counts 1-6.

Defendant was not charged with performing oral sex on John Doe 1, (1) above. Defendant was not charged with allowing John Doe 1 to stroke his penis, (2) above. Defendant was not charged with cajoling John Doe 1 to masturbate in his presence, (4) above. With regard to this sexual activity, the trial court correctly found this behavior was not sexual assault (304:6-7).[3] As to behaviors (6) and (7), the court instructed the jury that "sack tapping" and "grubbing" were not criminal acts:

> There was been testimony to events referred to as sack tapping and grubbing during trial. These acts are not criminal and are not part of any of the offenses before the Court. They have been testified to for evidence of grooming, and should be used to guide you in evaluating those acts for that purpose only. You are not to consider any of those acts as evidence of criminal acts by the defendant, Donald P. Coughlin (305:93-94).

As the only conduct charged against defendant in Counts 1-6 involved defendant touching John Doe 1's penis in a sexual manner, only the conduct described in (3) and (5) above is relevant to the sufficiency of the evidence related to these counts. As to behavior (5), defendant allegedly measuring John Doe 1's penis, this conduct could arguably be the charged sexual contact. However, John Doe 1 described that conduct in only vague terms:

> Q: What did he do?

[3] Appellate counsel for defendant needs to clarify a remark made during the postconviction motion hearing. Counsel asserted, "that the trial court was correct in limiting its definition of sexual assault as it did in this case and I think that does impact on the sufficiency of the evidence and that is why we are making the claim we are making" (309:8). The State argues this is a concession there was no error in instructing the jury (State's brief at 23). This remark was intended only to be a comment on whether the trial court correctly concluded this behavior was not sexual assault.

> John Doe 1: Apart from always commenting—from early on he'd comment at the size of my penis, telling me how big it was and how impressed he was, he'd even tell his brothers and other people. There was a time that he brought a tape measure up to our bedroom when [John Doe 3] was there, and he measured all of our penis (sic) with the tape measure.
>
> Q: Did he say anything as he was measuring about what he was doing, how he was doing it?
>
> John Doe 1: He just told us how you measure, and was making comments on whose was the biggest and whose was the smallest.
>
> Q: Did he say there was a specific way how you should measure a penis?
>
> John Doe 1: Yes.
>
> Q: What did he say?
>
> John Doe 1: So it's not a written rule, per se, but he said you measure from the top of your penis for—to get your legal length or whatever, but you could measure from down by your testicles and get more length.
>
> Q; And you say he made comments about whose was the biggest and whose was the smallest. What comments did he make about that?
>
> John Doe 1: He was commenting that mine was the largest, and we were snickering that his was the smallest (299:164-65).

Conspicuously absent in this question and answer session is any indication defendant physically touched John Doe 1 during this penis-measuring conduct. This testimony does not recount sexual contact between defendant's hand and John Doe 1's penis.

This leaves the conduct set forth in (3) above, defendant touching John Doe 1's penis. As to this conduct, the State asserts John Doe 1 testified that defendant touched his penis repeatedly from the mid-1980s until 1995 (State's brief at 5-6). That is not exactly how John Doe 1 testified. John Doe 1 did testify that defendant performed oral sex on him about once a month for an unspecified period of time (299:162). John Doe 1

testified defendant stroked his penis more frequently than performing oral on him but again did not describe a specific time period (299:162). Later in his testimony, John Doe 1 testified he participated in "sexual activity" with defendant during each time period alleged in the amended information (299:173, 180, 186, 190-94). However, "sexual activity" was broadly defined by the prosecutor to include not only (1) defendant touching John Doe 1's penis, but also; (2) John Doe 1 touching defendant's penis; (3) John Doe 1 masturbating for defendant; and (4) defendant sucking John Doe 1's penis (299:168).

Defendant asserts the evidence presented by John Doe 1 was too vague to allow the jury to conclude beyond a reasonable doubt that defendant engaged in the discrete sexual activity of stroking John Doe 1's penis during each charged time period. At some point, the jury was asked to speculate as to whether the charged conduct in fact occurred during each time period when John Doe himself never explicitly testified it did. For that reason, the evidence is insufficient as it relates to Counts 1-6.

B. Evidence related to John Doe 2.

John Doe 2 testified to engaging in three sexual behaviors with defendant or in defendant's presence: (1) He testified defendant would "masturbate" his penis (303:24); (2) He testified he would masturbate in defendant's presence (303:19, 23); and (3) He testified defendant would measure his penis (303:18).

John Doe 2 testified that sexual activity occurred during each time period (303:28-29). However, his definition of sexual activity encompassed sexual activity that was not charged in any of the relevant counts. He did not testify to defendant touching his penis during the alleged measuring incidents. His testimony about the frequency of defendant touching his penis was overly vague. For the same reasons argued related to John Doe 1, the evidence was insufficient to support a conviction for each count related to John Doe 2.

C. Evidence related to John Doe 3.

John Doe 3 testified to engaging in four sexual behaviors with defendant or in defendant's presence: (1) He would masturbate defendant (301:42); (2) He testified defendant would "masturbate" his penis (303:41); (3) He testified he would masturbate in defendant's presence (303:47); and (4) He testified defendant would measure his penis (303:49).

John Doe 3 testified that sexual activity occurred during each time period (301:58-62). Again, his definition of sexual activity encompassed sexual conduct that was not charged in any of the relevant counts. He did not testify to defendant touching his penis during the alleged measuring incidents. His testimony about the frequency of defendant touching his penis was again very vague. For the same reasons argued related to John Doe 1 and 2, the evidence was insufficient to support a conviction for each count related to John Doe 3.

II. AS DEFENDANT IS UNABLE TO PROVIDE THE CORROBORATION NECESSARY TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL, DEFENDANT WITHDRAWS THIS ALLEGATION.

Before a *Machner* hearing could be held, trial counsel died. In this situation, case law requires defendant to provide corroboration of his claim of ineffective assistance of counsel. *See e.g. State v. Lukasik,* 115 Wis.2d 134, 140, 340 N.W.2d 62 (Ct.App. 1983). Defendant has no way of providing that corroboration and therefore withdraws this claim.

Appellate counsel must comment on the State's brief related to this issue. In its brief, the State's suggested that because the defense knew trial counsel was dealing with significant medical issues leading up to the postconviction motion, it was incumbent on the defense to seek corroboration from him before his death (State's brief at 11). This suggestion is unfair, insensitive and offensive. Appellate counsel met with trial counsel at his office before his death. He was ambulatory and able to converse with defense counsel in a very normal fashion. Defense counsel did not interrogate trial counsel to determine the severity of his illness during

that conversation. Counsel would never have done so. Counsel did not do an independent investigation to try to determine the severity of his illness through someone else. Counsel was unaware of the severity of his illness prior to his death.

The ineffective assistance of counsel allegation against trial counsel was not an attack on his competence. The trial court rightly recognized that even the best attorney could make mistakes (309:12). The issues of ineffective assistance of counsel raised by the defense were arguable. Through no fault of the defendant, he is now unable to ask trial counsel about relevant decision occurring during trial.

III. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE REAL CONTROVERSY HAS NOT BEEN TRIED.

The relevant standard is set forth in *State v. Burns,* 2011 WI 22, ¶24, 332 Wis.2d 730, 798 N.W.2d 166. As previously argued defendant was sentenced to 48 years in prison. Defendant received several consecutive sentences. The fact defendant was convicted of many counts directly impacted on his sentence. As set forth above, due to trial counsel's death, defendant's ability to pursue claims of ineffective assistance of counsel.

If defendant is not granted relief as sought above, defendant asserts he should be granted a new trial in the interest of justice. The term "sexual activity" was repeatedly used interchangeably with "sexual contact" during trial by the State. The State argues the jury was appropriately instructed multiple times by the court (State's brief at 33). However, while defendant was charged with touching the victims's penises in the relevant counts, during closing argument, the State argued:

> Now, the elements are two as it relates to the sexual assaults. And those are---one of those elements—it's actually the second element that the judge talked to you about, the second thing we need to prove, but it's the first one I want to talk about, and that's that they were under a certain age. For purposes of first-degree sexual assault, that means that they were under the age of 13, were 12 or less at the time those offenses occurred. For second-degree sexual assault, that means they were

> under the age of 16, in other words, they were 15, 14 or 13. Technically, you can charge second-degree sexual assault for a 12-year-old, but it's going to be charged as first. But they were between 13 and 15 at the time of those offenses.
>
> And the second element is that the defendant had sexual contact with [the victims], why they testified he did. **Or it could be [the victims] touching the defendant.** (emphasis added). And you remember their testimony, yes, they would on occasion masturbate the defendant. **So, it could be either one of those things** (emphasis added) (305:104-06).

There was a reason why the State felt safe making this argument. Immediately prior to this argument by the State, the closing jury instruction given by the trial court for the relevant counts was read:

> The defendant has entered a plea of not guilty to each of these charges, which means the State must prove every element of each offense beyond a reasonable doubt. Second-degree sexual assault of a child as defined in section 948.02(2) of the criminal code of Wisconsin is committed by one who has sexual contact with a person who has not attained the age of 16 years.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence, which satisfies you beyond a reasonable doubt, the following two elements were present: First, the defendant had sexual contact with [John Doe 1], [John Doe 2], and [John Doe 3]. Second [John Doe 1], [John Doe 2], and [John Doe 3] were under the age of 16 at the time of the alleged sexual contact. … Sexual contact is the intentional touching of the penis of [John Doe 1], [John Doe 2], and [John Doe 3] by the defendant, Donald P. Coughlin. The touching may of the penis directly, or it may be through the clothing. The touching must be done by any body part or any object, but it must be an intentional touching. Sexual contact also requires the defendant acted with the intent to become sexually aroused or gratified.
>
> **Sexual contact is an intentional touching of the victim of the penis of Donald P. Coughlin, if the defendant intentionally caused or allowed the victim to do that touching.** (emphasis added). The touching of the penis directly (sic) or it may be through the clothing. Sexual contact also requires the defendant had the intent to become sexually aroused or gratified (305:69-71).

Regardless of how many counts could have been charged in this case, defendant Coughlin was charged with discrete sexual contact, touching the penises of the three primary victims. He was not charged with any of the many other sexual behaviors recounted by these victims. The victims were extremely vague in recounted what occurred and when it occurred. The State asserts that on appellate review the court assumes the jury followed the instructions it received during trial. The obvious follow up question to the State's assertion is "what behavior was sexual contact for purposes of the relevant counts?" Was it defendant touching the victims' penises? Were some of the convictions based on a jury belief the defendant had made one or more of the victims touch his penis? From this record, one cannot say with any confidence what conduct the jury convicted defendant of related to each count. One cannot say with any confidence whether double jeopardy would bar future prosecution of defendant related to conduct involving the victims touching defendant's penis. There is a real likelihood the result of the proceedings would have been different had the jury been accurately instructed. The real controversy has not been tried. A new trial is warranted.

CONCLUSION

For the reasons set forth above, defendant's convictions should be vacated as argued above. He should be granted an acquittal on any vacated counts. In the alternative, defendant Coughlin should be granted a new trial in the interest of justice.

Dated: 4/22/2020

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CERTIFICATION AS TO FORM AND LENGTH

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. This brief is 2553 words.

Dated: 4/22/20

_____
Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify I have submitted an electronic copy of this brief, excluding the appendix, if any which complies with the requirements of Rule 809.19(12). I certify: This electronic brief is identical in content and format to the printed form of the brief filed on or after this date and that a copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: 4/22/2020

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Philip J. Brehm